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In The Supreme Court of The United States

———TERM, 196——

ERNEST TIPPET and CHARLES ELLIS WILLIS
PETITIONERS
VERSUS
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Ernest Tippett and Charles Ellis Willis, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on November 22, 1965.

OPINIONS BELOW

There was no formal opinion of the District Court. The oral rulings of the District Court are reproduced in Appendix A to this Petition.

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1965. This Court's jurisdiction is invoked under 28 U. S. Code §1254 (1), 28 U. S. Code §1651 and 28 U. S. Code §2106.

QUESTIONS PRESENTED

(1) Whether under 18 U. S. Code §2315, which establishes the crime of receiving stolen goods in interstate commerce valued at more than $5,000.00, the stolen goods should be valued at the time and place stolen or at the time and place received.

(2) Whether evidence of the market value of automobile tires (which are non-perishable standard commodity) in the State where those tires were alleged to have been illegally received was relevant to the market value of the tires in the State where they were stolen.

(3) Whether under 18 U. S. Code 2315 the interstate character of stolen goods was lost when the goods were taken to the home of the thief, who thereafter made a local sale of them.

STATUTES INVOLVED

The statute involved in this appeal is Section 2315, Title 18, United States Code, which is as follows:

"SALE OR RECEIPT OF STOLEN GOODS, SECURITIES, OR MONIES.

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 860."

STATEMENT

The defendants, Ernest Tippett and Charles Ellis Willis, were tried in the United States District Court for the Western District of South Carolina, Greenville Division, commencing October 29, 1964, on an indictment charging both of them with violation of Section 2315, Title 18, of the United States Code. The charge was that the defendants did receive, conceal and store goods, wares and merchandise, to-wit, automobile tires, of a value in excess of $5,000.00 which moved as, was a part of and constituted interstate commerce, from Gainesville, Georgia, to Greenville, South Carolina, in the Greenville Division of the Western District of South Carolina, and they then knew the same to have been stolen. The defendants plead not guilty to this indictment. Upon conclusion of the prosecution's case, counsel for the defendants moved for a judgment of acquittal for both defendants on the ground that as a matter of law the Government did not prove that at the time the alleged goods were received these goods moved as, were a part of and constituted interstate commerce. Counsel for the defendants renewed this motion at the conclusion of all of the testimony.

The facts adduced by the Government in support of its case against the petitioners showed that one, Greer, asked the petitioner, Tippett, who operated a service station, whether he wanted some tires, and Tippett indicated he would like to have some. Shortly thereafter Greer and accomplices stole between 260 and 265 tires from the place of business of the American Oil Company in Gainesville, Georgia. Greer arrived with the stolen tires in a rented truck at his apartment in Greenville, South Carolina, at around 2:30 on a Sunday afternoon. Within half an hour he had informed Tippett that he had the stolen tires and where he had stolen them. That night Greer and Tippett agreed on a price and the tires were moved to Tippett's service station. The following night Greer, with Tippett and

Willis, under cover of darkness moved the tires to a storage place in the nearby town of Greer, South Carolina. On this trip Greer told Willis where he had stolen the tires. Tippett paid Greer $800.00 in Willis' presence that night and a few days later Willis, a used car dealer, paid him the balance of $650.00 of the agreed price at Willis' place of business. The owner of the tires testified that the tires were valued at $9,113.46 retail, $6,135.70 wholesale, and that they had cost him as a jobber $5,581.50, and that this latter figure represented the fair market value of the tires.

The attorney for the petitioners attempted to introduce evidence of the market value of the tires at Greenville, S. C. The trial judge took judicial notice that the market value of goods varied from place to place and refused to admit the testimony regarding the value of the tires at Greenville, either for the purpose of showing their value where they were stolen or their value where they were received. This testimony, had it been admitted, would have shown that the tires were worth less than $5,000.00 at Greenville, S. C., and would also have rebutted the valuation in Georgia given by the witness for the prosecution. Since the value of the goods is an element of the crime, this testimony was vital to the defense.

After the Trial Judge charged the Jury on the applicable law and sent it out to deliberate, the Jury returned and asked whether either or both of these defendants had to receive goods of a value of $5,000.00 or more to violate the Section of the United States Code under which they were charged. The Trial Judge answered this question of law and then restated the charge originally given on aiding and abetting.

The Jury returned a verdict finding both defendants guilty. Counsel then moved the Court to set aside the verdict and for judgment of acquittal and, in the alternative, for a new trial. All motions were denied and the defendant, Tippett, was sentenced to serve seven

years and the defendant, Willis, was sentenced to serve five years. Bond was set on appeal and an appeal was taken in due course.

The petitioners appealed to the United States Court of Appeals for the Fourth Circuit, and their appeal was decided against them on November 22, 1965.

REASONS FOR GRANTING THE WRIT

I.

The question of whether the receiver of stolen goods, as that crime is defined by 18 U.S.C. 2315, is charged with the value of the goods received by him at the time and place received, or with the value of those goods at the time and place stolen, is a matter of novel impression. The Court of Appeals held that the receiver of stolen goods was chargeable with value of the goods at the time and place stolen.

This conclusion is an erroneous construction of the statute and places a defendant charged with this crime under an impossible burden in preparing and presenting his defense.

The statute itself states "whoever receives . . . goods, . . . of the value of $5,000.00 or more . . :" This clearly shows that what the accused receives must be of the value of $5,,000.00 or more, and calls for a valuation at the time and place these goods are received. Under the construction adopted by the Court of Appeals, the language of the statute is made to refer to the value of the goods stolen, not to the value of the goods received.

Markets may differ. Goods may deteriorate. The two values may differ substantially.

The construction of the statute adopted by the Court of Appeals requires the accused to obtain for his defense testimony as to values in a distant market. Such testimony will ordinarily be beyond the defendant's ability and resources to procure.

Let us suppose that perishable goods are stolen in

the State of Washington and received in the State of South Carolina, that the markets of the two States differ substantially or that the market value of the goods has been greatly diminished in the process of transportation. Under such circumstances goods that may have been worth over $5,000.00 when or where stolen will be worth less than $5,000.00 when or where received. At the trial of the accused in South Carolina, under the theory of the Court of Appeals, the accused may defend the case only by showing market values in the State of Washington at the time the goods were stolen. No ordinary accused could obtain such evidence, or procure witnesses on this point. No ordinary accused could afford the defense of such a case.

The rule of the Court of Appeals will often render it impossible to determine at the time the act of receiving is committed whether the Federal Statute has been violated. It may be argued that a receiver of stolen goods should not be allowed such nice calculations of the consequenes of his acts, but our society believes otherwise. One should be able to know within reason the consequences of an act at the time it is committed. The differences between a State and Federal charge are not inconsequential.

The construction adopted by the Court of Appeals twists a reasonably worded statute into a violation of concepts of fairness and due process of law. If this construction is not reversed it will become the law of the Fourth Circuit, by which not this case alone but all cases arising under this statute will be tried and decided. This rule will then either be adopted by other circuits or a conflict will arise which must ultimately be decided by the Supreme Court of the United States. Therefore it is imperative that this matter be resolved now, in this present case.

II.

The petitioners pray that this Court also consider two other manifest errors committed by the Trial Court.

(A) When the defense sought to introduce evidence going to establish market value of the tires, the Trial Judge refused to allow this evidence into the record because the witness for the defense could only testify as to the market value in South Carolina. The Court of its own motion took judicial notice that the market value of the tires allegedly stolen would vary from place to place and would vary from Gainesville, Georgia to Greenville, South Carolina. It is submitted that in the case of a standard, non-perishable, highly competitive commodity such as automobile tires, no substantial discrepancy in price from one State to a neighboring State could exist because of the laws of economics of our society.

The effect of the ruling of the Trial Judge was to preclude the defendants from producing evidence as to the value of the tires involved, which valuation is one of the essential elements of the crime charged. The Trial Judge, by taking judicial notice of the difference in value between Greenville, S. C., and Gainesville, Georgia removed this issue from consideration by the jury and prevented the defendants from creating any issue as to the value placed on the tires by the Government's witness, who under the circumstances had a direct and personal interest in placing a high evaluation on these tires.

The Court held that the value of the goods in Georgia was the value contemplated by the statute and that the value in South Carolina had no relevance to the value in Georgia. Therefore the defendants were prevented from producing the only kind of evidence regarding value reasonably accessible to them. In the average case, such as this one, the effect of such rulings is to prohibit the accused from challenging the valuation of goods made by the witness for the prosecution. This matter was raised as an issue on appeal, but the Court of Appeals dissmissed it as being without merit.

(B) The facts presented by the Government showed

that the tires had come to rest in Greenville, and that as a matter of law the interstate character of the transportation of these tires had ceased before they were offered for sale to the defendants. The thieves had no prior agreement that the defendants would purchase the tires. The only inference which can be drawn from the testimony is that the thieves intended to dispose of the tires after the tires had been transported to Greenville. They first intended to take these tires home and did so. Thereafter one of the thieves went out to see if the tires could be disposed of. The petitioners had no knowledge of these particular tires until the tires had lost their character as goods in interstate commerce.

Under the facts if this case, there was no issue for the jury to consider as to whether or not the goods were in interstate commerce at the time they were received. To allow the jury to consider this issue was substantial error and an improper expansion of the Federal Statute which was not contemplated by the Congress of the United States when this statute was passed. It is contended that for a violation to be committed under this section of receiving stolen goods in interstate commerce, the goods must either be actually in interstate comerce or the party who received them must have had some direct, substantial connection with stealing or transporting of the goods in interstate commerce. Neither of these conditions has been met in the instant case.

This issue was earnestly argued on appeal but was labeled by the Court of Appeals as without merit. This manner of dismissal indicated that the Courts of Appeal lack a well defined criterion for use in determining when stolen goods cease to be in interstate commerce for the purposes of this statute.

CONCLUSION

This case involves a patently erroneous construction of an important criminal statute, and is a matter of first impression.

This construction not only subverts the intent of Congress, but places an impossible burden on indigent defendants, and those of ordinary means, who will not be able to procure testimony as to values in a distant market.

The two additional errors deprived the petitioners of a fair trial in accordance with law.

For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

ABRAMS, BOWEN and TOWNES
By: Sol E. Abrams, Attorney for Ernest Tippett and Charles Ellis Willis,
P. O. Box 10128, Federal Station,
Greenville, S. C.

December 15, 1965.

APPENDIX A

FROM RECORD OF TESTIMONY

"MR. ABRAMS: May it please the Court, I would move for judgement of acquittal for both defendants. I will take them separately, if the Court will hear me on it - -

THE COURT: Yes Sir.

MR. ABRAMS: On the ground that a material element, as a matter of law, is missing in this case;that is, that the goods at the time they were received - believing the state's case - were not part of, moving as or constituting interstate commerce.

(Argument on motion)

THE COURT: I would have to overrule your motion. I think it's for the jury under proper instruction. Come back at 2:30, gentlemen.

(12:52 p. m. Court Recessed.)"

FROM RECORD OF TESTIMONY

"MR. ABRAMS: We move to set aside the verdict and for judgement of acquittal; in the alternative, for a new trial.

THE COURT: Any specific grounds?

MR ABRAMS: On the new trial - on the grounds, the same as we have already set forth.

THE COURT: Very good.

MR. ABRAMS: For the new trial, on the ground and the exception taken to the second charge after the jury came back in and was charged, on the Court charging them on aiding and abetting at that time.

THE COURT: I think it was my duty to do that.

MR. ABRAMS: I've got to look for what I can,your Honor.

THE COURT: I would have to overrule your motion Mr. Abrams.

MR. ABRAMS: I want it for the record.

THE COURT: I think they got a fair shake all the way."

FROM RECORD OF TESTIMONY

LOUIS BRYANT, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q Mr. Bryant, what sort of business are you in?

A I am a tire dealer.

Q Speak up a little bit, now. By the way, have you spoken to me until you came into the courtroom?

A No, sir.

Q How long have you been a tire dealer, sir?

A I have been in the business roughly about 30 years.

Q All right, sir, in your dealings, have you dealt with Atlas tires?

A Yes, sir, I have.

Q Are you familiar with them as well as other brands?

A Yes, sir.

Q I ask you, sir, to identify what this is?

A That is the price sheet published by Standard Oil for resale — wholesale and resale of tires.

Q Is that the Atlas tire?

A Yes.

Q The prices listed on there, are they dealer prices or jobber prices?

A It has a column for each one, service station buying price and retail too.

Q A person jobbing from that list, what percent discount would they get so that they would have a mark-up in it?

A Most jobbers get anywhere from 7½ percent to 10 per cent below this published price.

Q Is this a list of July, 1962, price list sheet?

A Yes, sir, July 15.

Q Prices in this list change any substantially from February, of 1962?

A Not very much, no, sir. Federal excise tax changes occasionally but price of the tire is pretty well stable at that time.

Q Would be at February, 1962?

A Yes, sir, won't be —

Q Was this Atlas tire a Standard Oil product?

A Yes, sir.

Q This is the Standard Oil list for their own Atlas tire?

A Yes.

Q Does anybody other than Standard Oil make Atlas tires?

A Standard Oil doesn't make Atlas tires. But at that time, Standard Oil was the only outlet in this state.

MR. ABRAMS: We introduce that.

(Price list of tires received into evidence as Defendants' Exhibit A.)

Q Let me ask you, sir, if you would explain this cost column.

A Well, they have a six to twenty-four buying price; a one to five; six to twenty-four; and a twenty-five through forty-nine; fifty through ninety-nine; one hundred through one hundred forty-nine; one hundred and fifty up.

Q One hundred and fifty up is in the last column?

A Yes.

Q Is that the column, sir, that the person who sells to the dealer makes his amount on?

A Yes, sir, he would make his percentage off of that.

Q Off of that last column?

A Normally, yes, sir.

Q Let me ask you about the Bucron tire at that time, of Atlas. What was it selling for? Do you know?

A They were on and off the market, Bucrons were at that time. The market wasn't too steady on Bucron tires. Independent tire dealers were selling them and other companies outside Standard Oil were selling Atlas Bucron tires.

Q All right, sir, back in February, of 1962, can you tell us what the approximately fair market value was for a dealer, what he would pay for it, on a Bucron?

THE COURT: In Georgia.

Q Let me ask you this: Were these prices standard in this area?

A Yes, sir.

Q Between Georgia and South Carolina, would they be approximately the same?

A Anywhere Esso operates, they would be standard.

Q That was universal?

A Yes.

Q Regardless of the state?

MR. HOWARD: Your Honor, we object to the Esso price list. I believe it has been testified this was sold by Amoco, American Oil Company.

THE COURT: There are two different outfits, as I understand.

MR. HOWARD: Unless he can testify American Oil Company is the same as that.

THE COURT: It is my recollection the gentleman that testified for the Government that was the owner of the tires in Gainesville, Georgia, he says his dealership was through the American Oil Company, and that price list that he recited were those that he set between he and American Oil Company. That is my recollection of the testimony. If he can qualify as to that, of course, he can testify.

MR. ABRAMS: I will try to get him qualified.

Q (By Mr. Abrams) Were you familiar with American Oil Company's list?

A No, sir, American Oil Company at that time had just started handling Atlas tires in this area. They come through Atlas' supply company. American Oil Company is a branch of — one branch of Standard Oil, but their price list — I don't know the individual set-up of each company.

Q I ask you to look at the prices in this list and tell me if these were the fair market value dealer prices on that tire ----------

MR. HOWARD: I object.

THE COURT: I don't think that would be proper. The question is as to the fair value of that property as it existed in the hands of the lawful owner of it there. As to what its value was from the standpoint of what they had ----------

MR. ABRAMS: Yes, sir. May I be heard?

THE COURT: You may be heard, but what you have got to come to — and we might as well meet it head-on — is this: you have got to qualify him that he is familiar with the price from the standpoint of the fair market price that the owner of that had to pay in his dealings with American Oil, because that was the source of his supply, as I understood his testimony. What he might or somebody else might have gotten through another source is not the issue here, as far as price is concerned.

MR. ABRAMS: Yes, sir, but I thought it would have probative value to show what dealers were paying for this, general price dealers are paying; and if he knows and that price is consistent between there and here, it would have probative value.

THE COURT: Go ahead. I don't think it's that material anyhow.

Q I will ask you, sir, if this list is the approximate price list of the dealer's cost of that tire, that particular tire, to various dealers in this area?

A It was at that time, yes.

Q Was that the same as in Gainesville, Georgia, approximately?

THE COURT: From what source, Mr. Bryant?

A Standard Oil didn't operate in Gainesville at that time under Esso. That's something else I don't know. In South Carolina, this would cover the whole district.

Q Would cover what?

A The district that Esso operates in.

THE COURT: In South Carolina?

THE WITNESS: In the whole United States that Esso operates in, yes, sir; probably cover the whole United States as far as Esso is concerned, but Esso didn't operate in Georgia at that time.

Q All right, sir, who operated in Georgia at that time?

A I believe Standard of Kentucky was operating in Georgia at that time.

Q All right, sir. What about the dealer prices. Do you know what the dealer prices were at that time?

THE COURT: Now, Mr. Abrams, we are just playing ring-around-a-rosy, unless you can get to the real issue here, and that's in Georgia. What he might quote as to the price and dealer price in South Carolina is one thing; the value is determined as to what the value was under the arrangements they had as to Georgia — Gainesville, Georgia.

MR. ABRAMS: That's what I was asking.

THE COURT: No, that wasn't what you were asking.

MR. ABRAMS: I meant to. Excuse me.

Q How would this price list, if you know, compare with dealer prices of this tire in Georgia at that time?

A I would figure it would be _____

THE COURT: Not what you figure. You would have

to know of your own knowledge.

A I haven't compared it with an Atlas price sheet in Georgia. That would be the -------

Q Let me ask you this: do you know of your own knowledge what Bucron tires were selling to dealers at at that time, that is, in February, of 1962, in South Carolina — first?

THE COURT: It's immaterial as to what they sold for in South Carolina. That's not in issue.

Q In Georgia?

A No, sir, I don't know what they were selling at in Georgia. No, sir, I don't.

Q Would there be any reason — I will ask you because of your experience and knowledge — to have any substantial difference in price between South Carolina and Georgia on these tires?

A I don't think there would be any difference.

THE COURT: Do you know? Wouldn't it depend on the contract?

THE WITNESS: Standard Oil operates on a cost plus basis on their ----------

MR. HOWARD: We are talking about Amoco.

THE COURT: That's the whole point, and he says Standard Oil wasn't operating.

MR. ABRAMS: No further questions.

MR. HOWARD: I have no questions.

THE COURT: (Referring to Exhibit A) That wasn't put in, was it?

MR. HOWARD: I move to withdraw that as being immaterial since it is a Standard price list.

THE COURT: I don't think it's competent. It wasn't ruled on because you just walked up and put it up here and he sat there and didn't open his mouth.

MR. ABRAMS: No, sir, I did introduce it.

THE COURT: But he didn't open his mouth then; but since it's developed it is a completely different schedule from what the Government's contention is, it isn't competent. I am striking it out. Let's see if we understand — I'm sure I'm correct. That is the schedule that Mr. Bryant testified was Standard Oil's schedule that was in force in South Carolina at this time?

MR. ABRAMS: No, sir, he said their general schedule

all over the country.

THE COURT: Wherever they were in business. Then he followed it up by saying at that time they were not in business in the State of Georgia.

MR. ABRAMS: But it was standard.

THE COURT: Don't argue with me. Did he say that?

MR. ABRAMS: He said Standard Oil that's here wasn't in Georgia. He said Standard Oil of Kentucky was in Georgia.

THE COURT: And he said he didn't know what the American Oil price range was as far as their operation in the State of Georgia. In effect, that's what he said?

MR. ABRAMS: Yes, sir.

THE COURT: That couldn't be relevant.

MR. ABRAMS: It's the same tire.

THE COURT: It's the same tire.

MR. ABRAMS: Same brand.

THE COURT: We will take common knowledge in different places in the country and through different sources, you pay different prices. That's common knowledge.

MR. ABRAMS: All right, sir.

* * * * * * * *

Before HAYNSWORTH, Chief Judge, and SOBELOFF and J. SPENCER BELL, Circuit Judges.

Sol E. Abrams (Abrams, Bowen and Townes on brief) for Appellants, and Ernest J. Howard, Assistant United States Attorney, (John C. Williams, United States Attorney, on brief) for Appellee.

J. SPENCER BELL, Circuit Judge:

The defendants appeal from a judgment based upon a jury verdict finding them guilty of receiving stolen goods of a value in excess of $5,000.00 which moved as interstate commerce in violation of 18 U.S.C.A. § 2315. The Government offered evidence to show that the defendant Tippett, who operated a service station, indicated to the witness Greer that he desired Greer to secure some tires for him. Shortly thereafter Greer and accomplices stole between 260 and 265 tires from the place of business of the American Oil Company in Gainesville, Georgia. Greer arrived with the stolen tires in a rented truck at his apartment in Greenville, South Carolina, at around 2:30 on a Sunday afternoon. Within half an hour he had informed Tippett that he had the stolen tires and where he had stolen them. That night Greer and Tippett agreed on a price and the tires were moved to Tippett's service station. The following night Greer, with Tippett and Willis, under cover of darkness moved the tires to a storage place in the nearby town of Greer, South Carolina. On this trip Greer told Willis where he had stolen the tires. Tippett paid Greer $800.00 in Willis'

presence that night and a few days later Willis, a used car dealer, paid him the balance of $650.00 of the agreed price at Willis' place of business. The owner of the tires testified that the tires were valued at $9,113.46 retail, $6,135.70 wholesale, and that they had cost him as a jobber $5,581.50, and that this latter figure represented the fair market value of the tires. Of the four questions raised on this appeal only one merits serious discussion, and that is whether the trial court committed error in declining to allow a defense witness to testify to the fair market value of the tires in South Carolina as distinguished from their value at Gainesville, Georgia, where they were stolen.

It is clear from the record that at the trial both sides operated on the theory that the issue of value of the stolen property was to be determined by the market value of the property at the time and place of the theft. The defendants, however, sought to offer evidence of the value of the property in the South Carolina market on the theory that the value varied so little anywhere in the United States that the South Carolina value would be relevant on the question of value in Georgia. However, their expert testified that he was not familiar with the Georgia market and could not say of his own knowledge whether it was at or near the same figure as the South Carolina market. Under these circumstances we cannot say that the court was in error in excluding the testimony. *Montana Railway Co.* v. *Warren*, 137 U.S. 348, 353 (1890); *Hunt* v. *Bradshaw*, 251 F.2d 103, 107 (4 Cir. 1958); *Steingut* v. *Guaranty Trust Co. of New York*, 58 F.Supp. 623, 640 (S.D.N.Y. 1944).

Counsel was not able to point out to us and we have not found any cases dealing with the value problem in 18

U.S.C.A. § 2315 (Sale or receipt of stolen goods, etc.) as distinguished from 18 U.S.C.A. § 2314 (Transportation of stolen goods, etc.). In those cases which deal with § 2314, the authorities seem agreed that the property must be evaluated at the time and place where it was stolen. *Herman* v. *United States,* 289 F.2d 362, 366 (5 Cir. 1961); *Husten* v. *United States,* 95 F.2d 168, 171 (8 Cir. 1938), and cases therein cited.

We can think of no reason why the receiver should not be held liable on the same basis since he receives the property knowing it to have been stolen even though he may not know exactly when or where. This rule would also serve the practical purpose of not setting up two different standards which might complicate joint trials involving thieves, transporters, receivers and sellers of such property in elaborate interstate transactions. A rule requiring a different basis for evaluation under § 2315 might also result in splitting the jurisdiction in some circumstances between state and federal courts, a result to be avoided. Though the act of transporting may change the actual value of the goods, we have no difficulty in denying the receiver the benefit or detriment (depending upon how one looks at it) of the work product of the transporter.

The more difficult problem is the determination of the value to be attached to the property at the time and place of its theft. Title 18 U.S.C.A. § 2311, the section on definitions in the National Stolen Property Act, defines value as follows:

> " 'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all

goods, wares, and merchandise, securities and money referred to in a single indictment shall constitute the value thereof."

This court has had no occasion to define market value in those cases involving larger quantities of merchandise than would be involved in a retail transaction. In *Herman* the thief stole 900 rings in a jewelry manufacturer's sample case. The defense insisted that the value should be the cost of production. The court held that value should be the cost of production plus a reasonable markup. In discussing a reasonable markup the court said: "General retail value would naturally include a reasonable mark-up, and evidence as to retail value of the goods is properly admissible." In *Gordon* v. *United States,* 164 F.2d 855 (6 Cir. 1947), a quantity of watches was stolen from a manufacturer's salesman. Evidence was offered that the company filed a claim against its insurer for $6,190.50 which was settled for $4,600.00, the inventory value. A qualified expert testified that value of the watches to the ultimate consumer was approximately $15,000.00. The court held that it was proper to offer in evidence the retail value. In *Husten* v. *United States, supra,* involving the theft of a large number of rings from a manufacturer's salesman, the majority held that the determinative value was the retail value or cost to the ultimate consumer. The court reasoned that the purpose of the statute was not to directly or indirectly reimburse the owner but was intended solely to punish the thief. Apparently for this reason the court concluded that it was consonant with the spirit of the statute to affix the highest possible value to the property stolen. With this reasoning we cannot agree since we take it that the Congress intended by placing a jurisdictional amount in the statute to limit

the federal courts to transactions involving substantial amounts of property[1] and we think it compatible with the intent of Congress to give to the term "market value" its normal meaning in a commercial transaction where, as here, the goods which were stolen were held for sale by the lawful owner in the ordinary course of business.[2] Here the lawful owner testified that the tires involved cost him $5,581.50 and that the wholesale value was $6,135.70. We would take this latter figure to be the going price for 260 tires of this make and quality and therefore the market value at the time and place of the theft. We think this rule neither grasps for federal jurisdiction nor misconstrues Congress' intent in placing a jurisdictional minimum on the federal offense. It offers the further advantage of being reasonably susceptible to proof in the average case.

Affirmed.

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[1] The bill as originally passed by the Senate provided for a jurisdictional amount of $1,000. 78 Cong. Rec. 6981 (April 20, 1934). The House, however, amended the bill raising the amount to $5,000. 78 Cong. Rec. 6981 (May 5, 1934).

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[2] In *United States* v. *Palumbo*, 317 F.2d 607 (2 Cir. 1963), in a case involving goods stolen from interstate commerce, the court upheld a conviction where the only evidence offered was the invoice price.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 845

ERNEST TIPPETT AND CHARLES ELLIS WILLIS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1965. On December 23, 1965, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to January 4, 1966, and the petition was filed on December 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

790-423—66

QUESTIONS PRESENTED

1. Whether, under Section 2315 of the Criminal Code (which punishes the receipt in interstate commerce of stolen goods having a value of more than $5,000), value is to be determined as of the time and place of theft, rather than the time and place of receipt.

2. Whether the trial court correctly rejected the testimony of a witness, called by petitioners, who based his estimate of value on a price list of a company that did not operate in the State of the theft.

3. Whether the evidence established that the stolen goods were in interstate commerce when petitioners received them.

STATUTES INVOLVED

18 U.S.C. 2315 provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise securities, or money of the value of $5,000 or more, * * * moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2311 provides:

> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

STATEMENT

Petitioners were convicted in the United States District Court for the Western District of South Carolina of the knowing receipt of stolen goods having a value of more than $5,000 and moving as interstate commerce (18 U.S.C. 2315). Petitioner Tippett was sentenced to imprisonment for seven years and petitioner Willis to imprisonment for five. The evidence showed that Tippett, who operated a service station in Greenville, South Carolina, told one Greer in February 1962 that he wanted some tires, and Greer said he would look for them (R. 6). Greer and his accomplices stole approximately 265 Atlas tires from the American Oil Company (Amoco) in Gainesville, Georgia, and carried them back to Greenville in a rented truck on a Sunday afternoon (R. 7–8). Within half an hour of his return, Greer told Tippett that he had the tires (R. 8). That night, Greer and Tippett agreed on a price, and the tires were moved to Tippett's service station (R. 8). On Monday night, petitioners and Greer, under cover of darkness, moved the tires to a storage place in a nearby town. Both petitioners paid Greer for the tires, and both knew where they had been stolen (R. 13–14). The owner of the tires testified that their retail value was more than $9,000, their wholesale price more than $6,000, and the cost to him as a jobber more than $5,500 (R. 60–64).

Petitioner offered the testimony of a tire dealer in Georgia (R. 72–78; Pet. 11–16), who referred to a 1962 price list of Esso (Standard Oil Company) for Atlas tires and stated that Esso had been the

only outlet for such tires in South Carolina at the time (Pet. 11–12). He testified that Esso did not operate in Georgia, and that he did not know the price at which Atlas tires were selling to dealers in Georgia at the relevant time (Pet. 14–15). He stated that Esso operated on a cost-plus basis but he could offer no information as to Amoco (Pet. 15). In these circumstances, the court excluded his testimony as irrelevant, observing that it was common knowledge that "in different places in the country and through different sources, you pay different prices." (Pet. 16.)

ARGUMENT

The decision below is clearly correct, and there is no conflict with any other circuit. Accordingly, further review is not warranted.

1. Although at trial petitioners did not question the assumption of the trial judge and the government that the value specified in Section 2315 must be determined as of the time and place of the theft, on appeal they argued that the relevant time and place was that of receipt. While, as the court below noted, there are no decisions on this precise issue, it has been uniformly held with respect to offenses under Section 2314 of the Criminal Code—a companion provision which punishes the transportation of stolen goods—that the stolen goods are to be valued at the time and place they were stolen. *Herman* v. *United States,* 289 F. 2d 362, 366 (C.A. 5), certiorari denied, 368 U.S. 897; *Husten* v. *United States,* 95 F. 2d 168, 171 (C.A. 8). We do not understand petitioners to challenge the correctness of these decisions; and if

they are correct, surely the test they apply equally governs Section 2315, the provision here in suit, since it would be completely anomalous to punish the thief and the receiver under different standards. Sections 2314 and 2315 are complementary provisions of the National Stolen Property Act, and, as the court of appeals pointed out, "two different standards * * * might complicate joint trials involving thieves, transporters, receivers and sellers of such property in elaborate interstate transactions" (Pet. App. A19), and in some cases might lead to a division of criminal jurisdiction over a single transaction between State and federal courts.

2. It is clear from the record that the trial judge rejected the testimony of petitioner's witness, not merely because he was testifying as to prices in South Carolina, but because he wished to testify about a distribution system that did not even operate in the place of theft at the time in issue. The witness based his testimony on a price list of Esso—which, he admitted, did not do business in Georgia—and expressly stated that he had no knowledge of how Amoco, from which the tires were stolen, set prices. The trial judge correctly pointed out that the retail price of the tires could well vary with the distributor, as well as with the place of sale.

3. Petitioners' contention that the evidence did not show that the tires were moving as commerce at the time of receipt is without merit. The evidence was that Greer was asked by Tippett to get tires; that within a half hour of bringing the tires stolen in Georgia to South Carolina, Greer reported back to

Tippett; and that the tires were brought to Tippett's service station that very night, and removed to a hiding place the next day. The tires were thus moving in interstate commerce at the time petitioners received them. See *Corey* v. *United States*, 305 F. 2d 232, 236 (C.A. 9), certiorari denied, 371 U.S. 956, and cases there cited.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966